No. 14803

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALFIO BATELLI,

Appellant,

vs.

KAGAN AND GAINES CO., INC.,

Appellee.

APPELLANT'S OPENING BRIEF.

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This is an appeal by Alfio Batelli, defendant-appellant from a judgment entered March 29, 1955, in Case 16770-Y in the District Court of the United States in and for the Southern District of California, Central Division. This was an action for breach of contract in which the District Court had jurisdiction by reason of diversity of citizenship and the amount in controversy exceeded Three Thousand ($3,000.00) Dollars as is shown by the pleadings on page 3 of the Transcript of Record. This appeal is brought pursuant to 28 United States Code, Section 1291.

Statement of the Case.

Appellant is a maker of fine violins, who lived in Italy until 1947 when he came to this country and took up residence in Chicago, Illinois, where he was employed by appellee as a maker and repairer of string instruments until 1951. Appellee brought suit No. 14,787-Y in the United States District Court for the Southern District of California for breach of an employment contract. In this first action a judgment was entered on May 5, 1954, that plaintiff take nothing and that defendant recover costs, based upon the court's conclusion of law that the contract sued upon had been terminated by mutual agreement of the parties.

Appellee, Kagan and Gaines then instituted a second action based upon another contract signed by the parties [Ex. A, Tr. p. 9], which action is now being appealed from. At the trial of said action, appellee read in evidence a deposition of Robert Kagan, president of appellee corporation, which was taken in Chicago on December 9, 1954. In that deposition, the witness was asked whether he affirmed the answer he gave on the question of damages in a previous deposition taken in Chicago on February 9, 1954, for use in the aforementioned first action.

Appellee also introduced in evidence the entire deposition of this witness, which had been taken in Chicago on February 9, 1954, and the deposition of two other witnesses, Anthony Kovalkowski [R. p. 111] and Phillip

Scharf [R. p. 107] also taken in Chicago, all of which were taken in this first action which had terminated in a judgment that plaintiff take nothing. All these items of evidence, which were the only evidence produced by appellee on the question of damages, were allowed into evidence over the objection of appellant.

Specification of Errors Relied Upon.

Defendant-appellant brings this appeal on the ground that the trial court erred in the admission of two items of evidence:

1. The introduction into evidence of the question and answer in the second deposition in which the witness affirmed his statements in the first deposition. This may be found on page 54 of the printed transcript of record.

2. The introduction into evidence of the depositions taken in the prior completed action. This may be found on page 55 through page 59 of the printed transcript.

Appellant objected to the admission of both these items of evidence on the ground that they are inadmissible under Rule 26(d)(4) of the Federal Rules of Civil Procedure because they are hearsay evidence.

ARGUMENT OF THE CASE

I.

The Admission of This Evidence Violates Both the Language and the Spirit of Rule 26(d) of Federal Rules of Civil Procedure Because the Same Issues and Motives for Cross-examination Were Not Present in the Prior Action.

Rule 26(d)(4) provides:

> "Substitution of parties does not affect the right to use depositions taken; and when an action in any court of the U. S. or of any state has been *dismissed* and another action involving the *same subject matter* is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the later as if originally taken therefor."

This rule, which governs the use of depositions in the United States District Courts lays down two requirements, *both of which must be satisfied* by the proponent of the evidence before a deposition taken in a prior action may be used in a later action.

In interpreting the word "subject matter" in this statute, the courts have construed it to mean that the later action must be substantially between the same *parties* and must involve the same *issues* as in the former action. The rules of evidence are designed to exclude unreliable testimony, such as hearsay. The safeguards which the law sets up are the oath and the right of the adverse party to cross-examine the witness. In applying these safeguards, the courts have recognized that if the parties were different, or if the issues involved in the

two actions were not identical, the right of the adverse party to cross-examine in the later suit would be impaired. (*Mid-City Bank & Trust Co. v. Reading Co.,* 7 F. R. S. 26d 62, 3 F. R. D. 320.)

It is true that many courts, including some of the Federal Courts (*Wolf v. United Air Lines,* 12 F. R. D. 1 (D. C. Pa., 1951)) have adopted the more liberal rule expressed by Prof. Wigmore (5 Wigmore (3rd Ed.), Sec. 1388) under which the deposition may be used even though there is not an identity of parties, so long as there is an identity of issues. Appellant wishes to point out, however, that no court in the land has gone so far as to abolish the requirement of identity of issues.

In the present case, the issues in the two cases were not the same, so that the appellee has not satisfied this essential requirement of Rule 26(d)(4). The word "issue" is defined in Black's Law Dictionary (4th Ed.), page 965 as "the disputed point or question to which the parties in an action have narrowed their several allegations, and upon which they are desirous of obtaining the decisions of the proper tribunals. When the plaintiff and defendant have arrived at some specific point or matter affirmed on the one side, and denied on the other, they are said to be at issue" (citing *Knaggs v. Cleveland-Cliffs Iron Company,* 287 Fed. 314). Similarly, other courts have defined an "issue" as a question, either of fact or of law, raised by the pleadings, disputed between the parties, and mutually proposed and accepted by them as the subject for decision. (*Riggs v. Chapin,* 7 N. Y. Supp. 765.)

Here, the *only question* to which the parties had narrowed their allegations by the pleading in the first action

was the appellee's right to recover *under the first contract* which had been terminated by mutual consent. This was the only matter mutually proposed and accepted by them as the subject for decision. The "issues" in the present case involve the right of appellee to recover under a *separate and distinct contract* entered into between the parties at a later date.

Appellant recognizes the fact that the two contracts were, to a very great extent, similar in content. This does not mean, however, that a skillful attorney would ask the same questions on cross-examination of the witness. Many courts recognize that even though two cases are based on transactions which involve many of the same facts, the line of questioning used in cross-examination would not be the same. (*Haglage v. Monark Gasoline and Oil Co.,* 221 Mo. App. 1129, 298 S. W. 117.)

A good illustration of this is *Oliver v. Louisville and N. R. Co.,* 17 Ky. L. Rep. 840, 32 S. W. 759, where in an action by a husband and wife for personal injuries to the wife, depositions taken in a former action by the husband against the same defendant for loss of services of the wife caused by the same accident were held to be inadmissible, though they related wholly to the character of the injury and manner in which it was received. The court stated:

> "While the reason for the rule mentioned does not exist to the same extent as if there had been different occurrences or transactions, we can very well see how disregard of it by the court might have taken defendant by surprise and deprived it of the advantage of developing on cross-examination, admissions and confessions of the wife it was not permitted to show in the other suit . . . more-

> over, defendant could not be legally deprived of an opportunity, afforded him by enforcement of the rule, to again cross-examine the witness."

As long ago as 1814, the Pennsylvania Supreme Court held that a deposition taken in an action of ejectment was not admissible in a subsequent action between the same parties which is *based upon another title, because the points of inquiry may be different,* and consequently it may be necessary to ask different questions of the same witness. This court in *Cluggage v. Duncan,* 1 Sergeant & Rawle's Reports 111 went to the heart of the matter when it said "So that, in truth, the two actions rest on different titles, and it might be doing injustice to plaintiff to introduce a deposition taken *under different circumstances.* The points of inquiry may be different and consequently, it may be necessary to ask different questions of the same witness." Similarly, in the instant case, many attorneys would wish to ask different questions if they knew that a different contract was involved.

Even Wigmore, who was the founder of the "liberal rule" which abolishes the need for identity of parties recognized that the *true test is one of identity of interest and motives in cross-examination.* In *Rivera v. American Export Lines,* 17 F. R. S. 26d 62, 13 F. R. D. 27 (Dist. Ct. N. Y., 1952), the court applied this test in the following language:

> "Are the issues in the two cases so similar that the attorneys for Export cross-examined the officers and crew of the Hellenic with the same *motive and interest* they would have had if they had been cross-examining the same witness in the action brought by plaintiff Rivera?"

Similarly, in the present case, the motives of an attorney conducting the cross-examination in a suit upon one contract may very likely be different from his motives in conducting the cross-examination in a suit based upon a different contract, which *will require the use of different trial tactics and strategy.*

In *United States v. Silliman,* 10 F. R. S. 26d 62, 6 F. R. D. 262 (Dist. Ct. N. J., 1946), the contention was made that the defendant in this action, an attorney who conducted the cross-examination when a deposition was taken in a prior action had the same opportunity to cross-examine that he would have had if he had been a party to the prior action. The court said:

> "With this contention, the court cannot agree. To conclude that there had been an opportunity to cross-examine on the issues of the case, necessarily *presupposes as a fact that Silliman knew that he was himself subsequently to be the subject of the same charges of fraud. Such a supposition this court may not make a matter of speculation.*"

Applying this reasoning to the present case, how could appellant Batelli know at the time the depositions in question were taken that another suit would later be brought?

Appellant's attorney is now faced with precisely the same problem as was Silliman. An attorney owes a duty to his client to win the case with the expenditure of as little money as possible. Here, he found that he could win the case without putting his client to the unnecessary expense of attending the taking of depositions in a re-

mote city, because he knew that his opponent was suing on an abandoned contract. At this point *he had no way of knowing that another suit would later be brought,* and certainly he was under no duty to warn his forgetful adversary that said adversary was suing on the wrong contract.

When a second action is brought after much time has elapsed, the attorney now finds himself haunted by these depositions taken in the earlier action which had been completed, and is deprived of the opportunity of being confronted by the witness and of cross-examination. Certainly the attorney should not be penalized for trying to save his client, who is far from being wealthy, from what he justifiably thought were unnecessary expenses. Nor should the impoverished client be penalized by the use of these depositions, which were the only evidence in the case.

If we examine the reason for the dilemma of this attorney and his client, we can easily see that it is a recurrence of the same problem which was involved in *Cluggage v. Duncan,* and in the *Rivera* and *Silliman* cases. He has been caught off balance at the second trial because the issues and motives for cross-examination were not the same in both actions, even though they were based on facts which are somewhat similar. It was precisely to avoid such difficulties as this that thousands of cases have stated that the "issues and motives" must be the same, and Rule 26(d) requires that the "subject matter" must be the same.

II.

The Admission of This Evidence Contravenes Rule 26(d)(4) Because the Prior Action Was Not Dismissed, so That the Issues and Motives for Cross-examination Are Not the Same.

As pointed out by the Honorable Trial Court on page 59 of the printed transcript, the precise question involved here is one which has never before been presented under the Federal Rules of Civil Procedure, either in the Ninth Circuit or elsewhere in the courts of the United States. Therefore, this court should give serious thought to the language of the Rule and the intent of the committee which promulgated it before deciding this question.

The word "dismissed" as used in Rule 26(d) has acquired a definite meaning through many years of use. It is a final ending of a particular proceeding, but one which is *not a final judgment.* (*Taft v. Northern Transp. Co.,* 56 N. H. 417.) This word means that there has been no decision on the merits (*Wight v. Wight,* 272 Mass. 154, 172 N. E. 335) and has the same meaning as the words "discontinuance" or "nonsuit." (*Pear v. Graham,* 258 Mich. 161, 241 N. W. 865, and the many statutes which use these words interchangeably and are quoted at length, *infra.*) As your Honors know, these words mean that the proceedings are ended before the court has made any final decision, and often occur before the presentation of evidence has been concluded. Furthermore, the word "discontinuance" usually means that the *plaintiff himself* withdraws the case, which is a far cry from the final judgment in favor of appellant, which was entered after a full trial in the first action involved here.

In drafting this section of the Federal Rules in 1938, the only hint given by the Advisory Committee to the Supreme Court as to their purpose was the notation "Compare Equity Rule 64 and 2 Minn. Stat. 9835." Since Equity Rule 64 was worded very broadly and did not go into this matter in detail, we can only infer that the Committee meant to follow the lead of the Minnesota Statutes, which was renumbered Minn. Statutes Annotated of 1949, Section 597.16, and which goes into the matter in great detail, using the same language. This section (which is now Rule 26.04 Minn. Rules of Civil Procedure) reads as follows:

> "When an action is *discontinued or dismissed,* and another action for *the same cause* is afterward commenced between the same parties or their respective representatives, all depositions lawfully taken for the first action may be used in the second in the same manner and subject to the same conditions and objections as if originally taken therefor provided the deposition has been duly filed in the court where the first action was pending and has ever since remained in its custody."

This section has existed in the Statutes of Minnesota ever since 1858, when courts were established in that State and has always been interpreted to exclude depositions taken in a prior proceeding that has been completed by an adjudication on the merits. The only concession which those courts have made is to say that a judgment on the pleadings was in effect, a dismissal. (*Watson v. St. Paul City Ry.,* 76 Minn. 358, 79 N. W. 308.) They have not interpreted this statute, which is very similar to Rule 26(d)(4) to allow the use of depositions taken in a prior completed action in which a full trial was had,

as in the case at bar. The judicial system of Minnesota has operated very well since its establishment, and litigants have been able to prove their cases without the use of such flimsy evidence as these depositions.

The codes of many other states also cover this point, as for example:

Idaho Code of 1932, Section 16-922 (now Sec. 9-922) provides that a deposition duly filed may be used in another action, *after dismissal for the same cause of action,* between the parties or their assigns or representatives.

Other statutes accomplish the same purpose, by using similar language. Florida Statutes of 1941, Section 91.28, provides:

> "When the *plaintiff* in any suit shall *discontinue it* or become nonsuited, and another suit shall afterwards be commenced for the same cause of action between the same parties or their respective representatives, all depositions lawfully taken for the first suit may be used in the second, in the same manner and subject to the same conditions and objections as if originally taken for the second suit."

Hawaii Statutes of 1945, Section 9868, provide that a deposition is admissible, after *nonsuit or discontinuance,* in another suit for the same cause of action between the same parties or their representatives.

To the same effect is Burns Indiana Statutes of 1933 (1946 Replacement), Section 2-1523.

Appellant's research discloses no cases in which any of these statutes have not been interpreted as written.

The Texas Statute, which is Rule 213, Texas Rules Civil Procedure, goes even further and provides that depositions may be read upon the trial "of any suit in which they are taken," and the courts have construed said statute to allow use of a deposition only in the trial for which it was taken or in the retrial of the same cause of action.

Let us now stop to think of the reason why the Advisory Committee to the Supreme Court which drafted the Federal Rules and the framers of all these other statutes used the language which they did. If depositions may be used after the first action has been dismissed, we may readily infer that they cannot be used when the case has resulted in a final judgment on the merits, since we know the meaning of the word "dismissed" as explained at the beginning of this section of appellant's brief. It should be obvious that they meant to exclude depositions taken in a prior completed action *because the issues and motives for cross-examination are not the same.* Your Honors know that as a practical matter of strategy and trial tactics, there are innumerable ways in which a skillful attorney's handling of the two cases would differ.

This is precisely what occurred in the case at bar. Appellant's attorney who sought to win the case for his client with a minimum of expense to his client, has, in effect, been punished for being solicitous of his client's

welfare, by the use of depositions taken in a prior completed action. At the second trial, he finds himself powerless to attack the depositions which were the sole evidence produced by appellee. Appellant submits that it was precisely such matters as this which were in the minds of the Committee which drafted the Rules. They realized that the high cost of expenses involved in litigation was one of the factors which would cause an attorney to have different motives for cross-examination or cause him to decide not to cross-examine at all. It would be contrary to the intention of the framers of this statute to allow such flimsy evidence, which was the sole evidence in this suit, to win the case for appellee.

There has been extremely few cases in the Federal Courts involving this section. The few cases in which it has come up (*Eller v. Mutual Benefit Health & Accident Assoc.,* 1 F. R. D. 280 (Dist. Ct. Iowa, 1940); and *Cervin v. W. T. Grant Co.,* 100 F. 2d 153 (5th Cir., 1938)), were all cases in which the depositions were taken in actions in state courts which were dismissed when the cases were removed to the federal courts. There has been no case which allowed the use of depositions taken in a previously completed action which terminated in a judgment on the merits as in the present case.

In discussing this rule, the leading writers on the subject are in agreement with appellant's position. Pike and Willis, in their article "The New Federal Deposition—Discovery Procedure" in 38 Columbia L. Rev. 1436 at page 1450 (1938) say "In most of the decided cases on the question the first action had been in fact dismissed. Those in which it was otherwise disposed of seem doubtful on the score of identity of parties or issues." This is pre-

cisely *the reason* for the Committee's use of the word "dismissed." An example of how depositions taken in a prior completed action may not be used in a subsequent action because the issues are not identical may be seen in *United States v. Silliman,* 10 F. R. S. 26d 62, 6 F. R. D. 262 (Dist. Ct. N. J., 1946).

Volume 4, Moore's Federal Practice (2d Ed.), page 1200, states only that the deposition of a party taken in a prior *dismissed* action may be used in the Federal Court by an adverse party, but makes no mention of the use of depositions from a prior completed case.

It may be that the Honorable Trial Court was mistaken as to the disposition of the first case. At page 106 of the printed transcript, he stated:

> "I am going to rule that all the depositions in the other case are admissible, because the other case was not decided on the merits, but was really a dismissal of the action on the ground that the evidence showed that the contract had been abandoned."

The wisdom of the trial court's ruling in the previous case is not before us at the present time, and the fact remains that a judgment that the plaintiff take nothing was entered in that case, so that there was no dismissal, and these depositions do not come within Rule 26(d)(4).

Appellant believes that the trial court's ruling on this question was in contravention of the language of the statute and of the obvious intention of the framers of the statute which was to insure that the motives of the attorney conducting the cross-examination are the same in both actions.

III.

These Depositions Are Hearsay and Are Otherwise Unreliable Evidence, the Use of Which Is Very Dangerous to the Extent That It Should Not Be Condoned by This Court.

The hearsay rule is defined in 5 Wigmore (3rd Ed.), Section 1364, as

> "that rule which prohibits the use of a person's assertion as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court on the stand, *where he may be probed and cross-examined* as to the grounds of his assertion and of his qualifications to make it."

Again, in Section 1365, he says the essential requirement of the rule is that statements offered testimonially must be subject to the test of cross-examination.

Thus, even in the decisions supporting the general rule that there must be substantial identity between the parties and issues in order to render the testimony or the deposition of a witness admissible, it is brought out again and again that the fundamental reason for such requirement is the necessity that there has been full opportunity to cross-examine. (*Warren v. Nichols,* 7 Met. (Mass.) 261; *Fredericks v. Judah*, 73 Cal. 604, and other cases cited in Anno. 142 A. L. R. 674.)

Our courts have repeatedly stated that a deposition is a substitute or second best, not to be used when the original is at hand, for it deprives the litigants of the advantage of having the witness before the jury. (*Arnstein v. Porter,* 154 F. 2d 464, at 470 (2nd Cir., 1946).)

In *Untermeyer v. Freund,* 37 Fed. 342, the court phrased it very neatly by saying:

> "A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression."

In the *Arnstein* case, the court stated:

> "As a deposition cannot give the look or manner of the witness, his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration, it is or it may be, the dead body of the evidence, without its spirit."

For this reason, the courts have refused to allow the use of depositions to prove events which may be proved by a witness available in person who is subject to cross-examination. (*Va. & W. Va. Coal Co. v. Charles,* 251 Fed. 83, aff'd 254 Fed. 379; *Holt v. Werbe,* 198 F. 2d 910 (8th Cir., 1952).) In *United States v. Silliman,* 10 F. R. S. 26d 62, 6 F. R. D. 262 (Dist. Ct. N. J., 1946), the court points out that a deposition taken without opportunity to cross-examine is in effect a mere affidavit, and is not admissible as evidence at the trial.

Furthermore, all depositions are hearsay, and are admitted only because the testimony is given under oath, and because the opponent has been given an opportunity to cross-examine the witness (5 Wigmore (3rd Ed.), 1940, Sec. 1377, and article entitled "Use of Depositions in Later Actions" in 5 Stanford L. Rev. 535).

If this is so, how reliable can a deposition be which consists of the witness's affirmation of what he said in

a previous deposition, as was done in this case? This is an example of "hearsay upon hearsay" and is totally unreliable.

The value to the trier of the facts, whether judge or jury, of the opportunity to see and hear the witness is recognized in many cases. (*Holt v. Werbe,* 198 F. 2d 910 (8th Cir., 1952).) Since a deposition is merely a substitute or second best when taken in the same case for which it is used, it is completely unreliable when it is sought to be introduced in a later case after long periods of time have elapsed.

As pointed out earlier, this is a question which has not come up previously under the Federal Rules of Civil Procedure. Therefore, appellant respectfully requests that this court give serious thought to this matter before it allows the admission of such flimsy evidence, and hands down a decision which may have serious repercussions in the future.

An affirmance of the judgment below would mean that this court condones the use of a practice which can lead to much abuse, since a plaintiff could use the practice followed in this case whenever two similar contracts are involved. Also, it would be extremely easy for a litigant to bring a suit on a fictitious contract, taking a deposition which he knows that the defendant, *who has been lulled into a false sense of security,* will not contest, and then to bring a second action in which he could be victorious by using this deposition, with respect to which his opponent has had no real opportunity of cross-examination.

Other situations exist which lend themselves to even greater abuse. As your Honors know, in determining whether multiple causes of action exist, California and many other states follow Pomeroy's theory that every time a primary right is invaded a cause of action arises. If there is an auto accident in which the plaintiff's person is injured and his car is damaged, California says there are two causes of action because two primary rights have been invaded—the right to freedom from injury to personal property and the right to freedom from his person. It would be extremely easy for a plaintiff who has a weak case to first bring a suit for the minor damages to his car. In this suit, he could take depositions in some remote place, knowing that his opponent's California attorney will not attend the taking of the deposition because the expenses of doing so would be disproportionate to the amount sought to be recovered in the suit and because defendant knows plaintiff's case is weak. At this deposition, plaintiff could say anything he liked, whether true or false, and without being cross-examined. After losing the first suit, plaintiff would then bring his second action in which he seeks to recover a much greater sum of money for the injuries to his person. He would then win his case by the use of the depositions taken in the first action because the court would say that the defendant has already had his opportunity to be confronted by and to cross-examine the witness.

Appellant therefore requests that the court give serious thought to this matter before condoning such practices

which may have these dangerous consequences. Resourceful attorneys can find many ways of disarming their opponents of their most powerful weapons by willfully creating the sequence of events which happened in this case, and placing a defendant in a position where he is powerless to attack a deposition which may be very unreliable, and may be the only evidence in the case. In deciding this appeal, this court is in a position to prevent a practice which is almost certain to have drastic consequences.

Respectfully submitted,

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